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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1272

RAYMOND SHEAFFER, ET AL., *Petitioner*

v.

WAREHOUSE EMPLOYEES UNION, LOCAL 730, ETC., *Respondent*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1969. However, the jurisdiction as alleged by Petitioner is not correct and is not within the scope of Rule 19 of this Court.

QUESTIONS PRESENTED

1. Was the action of the District Court Judge, affirmed by the Court of Appeals, in dismissing Petitioner's suit for failure to prosecute, an abuse of discretion in view of the Petitioner's repeated disregard of and failure to comply with the Orders and Rules of the United States District Court?

RULES INVOLVED

Local Civil Rules 11(a), 11(d) and 13(a). Rule 41(b) of Rules of Federal Civil Procedure.

STATEMENT OF THE CASE

This action arose out of a labor dispute between Petitioner, sometimes referred to as the Company, or Sheaffer, and Appellee, Local 730, sometimes referred to as the Union.

The Petitioner filed a suit on August 1, 1963 for compensatory and punitive damages, under Section 303 of the Taft-Hartley Act and the common law of the District of Columbia, alleging malicious interference with contractual relations and personal property. An Amended complaint was filed on November 27, 1963 concerning the alleged incidents of July and August of 1961. On January 14, 1964, the cause was calendared.

The case was dismissed on October 6, 1964, for failure to prosecute, but reinstated on October 19, 1964, because the dismissal was occasioned by mutual mistake of the parties.

On April 19, 1965, the suit was again dismissed for failure to prosecute, the Petitioner having failed to

comply with Local District Court Rules, Nos. 11(d) and 13(a).

On April 28, 1965, the Petitioner filed a Motion to Reinstate its suit. This was opposed by the Appellee. The matter did not come to hearing until January 7, 1966 because Petitioner failed to file a Motions Card. On this date the suit was reinstated by the Pre-Trial Examiner and the six month period of Rule 13(a) commenced to run. Appellee did not object to this re-instatement.

The Petitioner filed a Certificate of Readiness on June 20, 1966, and eight months later, on February 21, 1967, a pre-trial hearing was held and an Order issued.

Under this Order, Petitioner was to supply Appellee a computation of compensatory damages by March 15, 1967 and a list of witnesses by March 22, 1967.

Appellee, on April 7, 1967 filed a Motion to Dismiss together with a Motions Card or in the alternative strike from the calendar as the Petitioner had failed to abide by the Order of the Pre-Trial Examiner. Petitioner was mailed a copy of this Motion. Petitioner filed no opposition to Appellees' Motion, and in fact did not appear before Judge Jones to present opposing argument at the hearing held on April 21, 1967. On that date, Judge Jones ruled that the case be struck from Ready Calendar.

It was not until April 27, 1967, six days after the Court's ruling that Petitioner furnished Appellee with the information required by the Pre-Trial Order of February 21, 1967, approximately six weeks later than

directed by the Order. This information should have been furnished by March 15 and March 22, 1967, respectively.

On May 1, 1967, Judge Jones signed an Order, based upon his ruling of April 21, 1967, and the six month Rule of 13(a) again commenced to run.

More than six months after Judge Jones signed his Order of May 1, 1967, specifically on November 6, 1967, Appellee was served with a Certificate of Readiness, and a notice of appearance that another attorney was now associated in the case for Petitioner.

Appellee on November 16, 1967, filed an Opposition to the Certificate of Readiness and a Motion to Dismiss for Failure to Prosecute, asserting among other arguments that Petitioner had once again failed to comply with the Rules of the Court and that the suit was automatically dismissed.

The Appellee's opposition was referred to the Pre-Trial Examiner and she denied Appellee's Motion on December 8, 1967, and recommended that the case be reinstated.

On December 12, 1967, Appellee filed Objections to the Examiner's Recommendation of December 8, 1967, and asked that the cause be dismissed under Local Rule 13. The Motions Court, in its Order of January 5, 1968, granted Appellee's Motion. Petitioner subsequently filed a Motion to Vacate which was denied. That denial was appealed to the United States Court of Appeals which affirmed the Order of the trial judge on January 23, 1969.

ARGUMENT

This matter deals with the Interpretation placed upon Rules of the United States District Court for the District of Columbia and whether such interpretation constituted an abuse of discretion by the trial judge. The pertinent Rules and parts of said Rules read as follows:

RULE 13

DISMISSAL FOR FAILURE TO PROSECUTE

(Revised June 27, 1961)

(a) DISMISSAL WITHOUT PREJUDICE: NOTICE OF: WARNING.

"If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or take other action looking to the prosecution of his claim, *or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint,* counterclaim, crossclaim, or third-party complaint of said party, as the case may be, *shall stand dismissed without prejudice,* whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry. *One month prior to the termination of the six month period the Clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule,* making an entry in the docket of the mailing. (Revised June 27, 1961)."

(b) "FAILURE TO WARN: EFFECT. A failure of the Clerk to give the warning as above provided

will not affect the running of the six months' period or otherwise relieve a party from operation of this rule."

RULE 11

CALENDARING AND ASSIGNMENT OF ACTIONS: CERTIFICATE OF READINESS: CALL OF THE CIVIL CALENDAR: ASSIGNMENT COMMISSIONER, ETC. (Revised June 25, 1958)

(d) "CERTIFICATE OF READINESS. After a civil action is at issue and placed on the general calendar, any party thereto not in default may file and serve a certificate of readiness. Such certificate shall constitute a representation that all discovery has been completed and that the case is actually ready for trial. Within ten days thereafter any other party to the action may file objections to the certificate of readiness. If no objections are filed within ten days, the action shall be placed on the Ready Calendar. If objections are filed within said period, the party objecting shall at the same time provide and deliver to the Clerk a motions card calendaring same. In the event no motions card is provided at the time objections are tendered for filing, the Clerk shall refuse to accept the objections for filing. If the motions Court overrules the objections, the action shall be placed on the Ready Calendar. If the Motions Court sustains the objections, the action shall not be placed on the Ready Calendar, but in that event another certificate of readiness may be filed by any party at a later date, and such certificate shall be subject to the same procedure. (Revised April 4, 1962)"

Appellee acknowledged that its Motion to Dismiss for failure to prosecute, denied by the Pre-Trial Examiner on December 8, 1967, was in fact granted on January 5, 1968, just before the matter was to go to

trial. However, this fact in and of itself does not constitute an abuse of discretion on the part of the trial Judge. Since there must be a passage of time between the filing of Objections (12/12/67) and a hearing on said Objections to the Pre Trial Denial, the time and instance of the granting or denying of a motion and its relationship to a trial date is of little importance. When Appellee filed its Motion to Dismiss on November 16, 1967, no trial date had been set. Nor was it set on December 12, 1967 when Appellee filed Objections to the Pre-Trial Denial of its November 16, 1967 Motion.

Appellee respectfully points out to this Court the numerous occasions upon which Petitioner could have, if not should have, filed a Certificate of Readiness. That the Petitioner permitted its case to be dismissed for failure to prosecute is obvious from the record. The filing of a Certificate of Readiness on November 6, 1967, does not vitiate its failure to proceed as required by the rules.

Local Rule 13 of the U.S. District Court for the District of Columbia requires a Plaintiff to file a Certificate of Readiness under Rule 11(d) within six months of the date the action is called . . . .", for the case shall stand dismissed without prejudice." Since the latest of a series of failures to proceed must be measured from May 1, 1967, we discover from the record that no certificate was filed until November 6, 1967, a point in time six days later than the time limitations permitted by Rule 13. Since the Petitioner stood automatically dismissed under the immediately above referred to rule, procedurally it should have filed a Motion to Reinstate. This it did not do

and while the record reflected that the Pre-Trial Examiner disagreed with the argument presented by the Appellee herein, the District Court Judge in his order of January 8, 1968 recognized the apparent willful, if not negligent, failure of Petitioner to proceed.

It is respectfully suggested there are numerous dismissals for failure to prosecute. The failure to comply with the Pre-Trial Order of February 21, 1967, not only warrants the dismissal of this cause for failure to prosecute but in fact borders upon contemptuous attitude of the Court itself. The fact that since November 6, 1967, a new attorney has become associated with the case and has actively filed numerous documents, motions and appeals, does not now cure the failure of the Petitioner to have proceeded with due diligence. Appellee respectfully points out to the Court that the cases cited by Petitioner all recognize the right of the Trial Court to dismiss the cause for want of prosecution and also recognize that under Rule 60(b) of the Federal Rules of Civil Procedure that the relief permitted under this Rule is basically equitable in nature.

The power of a Court to dismiss a cause of action for want of prosecution is inherent and the exercise of this inherent power is not per se an abuse of discretion. (See *Link* v. *Wabash R. Co.*, 370 U.S. 626.) The trial judge and the Court of Appeals applied that decision herein.

It is submitted by Appellee that to reverse the action of the District Court Judge and the Court of Appeals would be to make a nullity of the rules which the District Court has adopted for its orderly operation. Either the rules are to be observed or the constant and

repeated failure to abide by said rules would cause chaos and delay in the orderly administration of justice.

Criticism has been directed to the administration of justice because of the large backlog of cases on the docket in many Courts and rules have been adopted by the Court in order to expedite cases before it. That this case was not expedited must rest solely upon the shoulders of Petitioner. The recent activity engendered by new counsel does not in any way correct its previous failure to prosecute. The Order of the District Judge, and its affirmation by the Court of Appeals, dismissing for failure to prosecute does not constitute an abuse of his discretion, *Barger* v. *B&ORR,* 75 U.S. App. D.C. 367, *Taub* v. *Hale,* 355 F. 2d 2010, cert. denied 384 U.S. 1007 (1966), nor does it constitute a misconstruction or extension of *Link* v. *Wabash R.R. Co.,* 370 U.S. 626, 87 S. Ct. 1386.

CONCLUSION

WHEREFORE, in the light of the above, this Court should dismiss the Petition for Writ of Certiorari.

Respectfully submitted,

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